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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

SOUTHERN UNION COMPANY,
UNICON PRODUCING COMPANY,
SOUTHLAND ROYALTY COMPANY and
EXXON CORPORATION,
Petitioners,

v.

JICARILLA APACHE TRIBE,
DONALD P. HODEL, Secretary of the
United States Department of the Interior
and STATE OF NEW MEXICO,
Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITIONERS' JOINT REPLY BRIEF

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PETITIONERS' JOINT REPLY BRIEF

Petitioners Southern Union Company, Unicon Producing Company, Southland Royalty Company, and Exxon Corporation submit this joint reply to the briefs in opposition filed by the Jicarilla Apache Tribe and the Secretary of the Interior. Respondents have failed to offer any substantial arguments against review by this Court.

On the contrary, in their efforts to divert attention away from the actual ruling of the court below, they have only underlined the important issues raised by these petitions.

1. We note, first of all, that respondents do little or nothing to rebut our basic critique of the Tenth Circuit's analysis of fiduciary duty. The Secretary, in fact, acknowledges that the Tenth Circuit's analysis is "largely mistaken." Opp. at 6. He endorses the Claims Court's "ordinary prudent man" standard for review of his actions in a fiduciary capacity, Opp. at 6 n.4—thus impliedly rejecting the Tenth Circuit's requirement that he resolve every ambiguity, and make every discretionary choice, in the way that best serves the immediate interests of the Tribe. More specifically, he makes it clear that his failure to impose dual accounting on these petitioners from 1950 to 1979 was not, in his view, a breach of fiduciary duty. *Ibid.* Indeed, he states that prior to the decision in this case, he had doubts about whether dual accounting was even *permitted* under the leases, and adds that even now he does not believe that dual accounting always serves the long-term interest of the affected Indians. *Ibid.*

As for the Tribe, it makes only a perfunctory effort to defend the Tenth Circuit's analysis. It cites two cases for the proposition that the Secretary, as a fiduciary, is dutybound to impose dual accounting because that royalty system may enhance tribal revenues. But neither case supports the Tribe's suggestion that the Secretary has no discretion and must maximize short-term royalty income to the Tribe.[1]

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[1] The first cited case—*Kenai Oil & Gas, Inc. v. Department of Interior*, 671 F.2d 383, 386 (10th Cir. 1982)—does state in *dictum* that the Secretary has a duty to maximize Indian lease revenues. However, the Tenth Circuit there emphasized the Secretary's "broad discretion" to consider all relevant factors affecting Indian interests, not just their immediate profit. *Id.* at 387. Moreover, it stated that any exercise of the Secretary's discretion is reviewable only under the usual administrative-law standard—*i.e.*, whether it was

2. In lieu of defending the ruling below, both respondents rely, in large part, on the fact that the Secretary has departed from the policy that prevailed from 1950 to 1979 and is now endorsing the use of dual accounting under these leases. The Tribe seeks to portray this case as a fight between the Secretary and petitioners, with petitioners cast in the role of challengers to the Secretary's own independent interpretation of the leases or independent policy choice under those leases. The Secretary's approach, by contrast, sounds more like a variant of a mootness argument. He is unwilling to articulate a general policy favoring dual accounting and seek deference to that policy. Instead, he simply states that, regardless of any ruling by this Court, he intends to mandate dual accounting *on these particular leases*, and suggests that this fact argues against review of the decision below.

The problems with these arguments are apparent. First, of course, even assuming that the Secretary would continue to require dual accounting after a reversal, that fact hardly justifies leaving in place a ruling that mandates this particular royalty system *permanently* as well as *retroactively*. It is one thing to give deference to the Secretary's current interpretation of the leases or his current exercise of his discretion. It is quite another to extend that current judgment, not only to an indefinite future, but also to a previous period when a different Secretary was taking a very different view.

Second, regardless of the present policy preferences of the Secretary with respect to these leases, a denial of

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"arbitrary, capricious, an abuse of discretion, or contrary to law." *Id.* at 386.

The other decision cited by the Tribe, *Marathon Oil Co. v. United States*, 794 F.2d 1461 (9th Cir. 1986), is even less apposite. In that case, the Secretary *voluntarily* initiated a change in the royalty formula under a federal mineral lease, and that decision was upheld against a challenge by an oil company using the usual "arbitrary and capricious" standard. The obligations of the Secretary as a fiduciary were not at issue, since the case did not involve rights of Indians.

review here would leave in place a decision that fundamentally alters prevailing assumptions about judicial review of secretarial actions affecting Indian tribes. The Tenth Circuit's reasoning would be equally applicable to several thousand identical leases on other Indian lands.[2] And it could control the interpretation and administration of many other commercial arrangements supervised by the Secretary for Indians.[3] In all of these areas, the Secretary henceforth would have only one permissible choice—resolving every ambiguity and making every choice in the manner that maximizes short-term tribal revenue. If this far-reaching decision is wrong, as we and the Government both believe, then the fact that the Secretary fortuitously approves of the particular royalty system mandated by that decision for these leases does not lessen the need for review.

Finally, the factual predicate of respondents' arguments—the suggestion that the Secretary has made a considered policy judgment in favor of dual accounting under these leases—is itself subject to serious question. In reality, the Secretary never took any action to require dual accounting by Jicarilla lessees—other than those that also owned the gas processing plant—until he was ordered to impose this system by the district court *in this case* in 1979.[4] Moreover, since that time there is no

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[2] The Secretary suggests that the "court of appeals' interpretation may not be controlling in other Indian lease agreements executed under different circumstances." Opp. at 8. But this assurance is insupportable since (1) all Indian oil and gas leases have involved the same basic form agreement for more than four decades, and (2) the Tenth Circuit relied on no circumstances that are peculiar to the Jicarilla context.

[3] The Tenth Circuit's use of a "stricter standard" of review in a fiduciary context has already been noted, although not accepted or relied on, by the Ninth Circuit in *Assinboine and Sioux Tribes v. Board of Oil and Gas Conservation*, 792 F.2d 782, 792 n.9 (1986).

[4] See J.A. 12a (dissenting opinion of Seth, J.). Indeed, the Secretary himself indicates the importance of this linkage, when he notes that "prior to the district court's decision, [he] maintained

indication that the Secretary has ever voluntarily extended this rule to any of the thousands of identical leases in effect on other Indian and public lands.[5] These facts are reflected in the Secretary's careful comments that the decision below is "consistent with [his] *present* interpretation of the *particular* lease agreements at issue *here*," Opp. at 6 (emphasis added), and that he endorses the requirement of dual accounting "at least in the present circumstances," Opp. at 8. In the absence of some explanation differentiating these sixteen leases from thousands of others concededly containing identical provisions, it seems clear that this endorsement is more a reflection of litigation strategy than a factor that should influence the Court's decision on the pending petitions for review.

3. The other argument against review raised by the Secretary is the suggestion that this is really just a "narrow contractual dispute between petitioners and the Jicarilla Apache Tribe." Opp. at 6. As the premise for this argument, the Secretary describes the Tenth Circuit as ruling "that petitioners are obligated *under their lease agreements* to pay royalties on a dual accounting basis." *Ibid.* (emphasis added). This description, in turn, becomes the sole basis of the Secretary's additional contention that it is appropriate to impose the burden of retroactive liability on petitioners rather than the Government. As he puts it, retroactive payments by lessees are clearly appropriate "[w]here, as here, lessees submitted royalty payments in a particular manner later found by the Secretary or a court to be *inconsistent with the terms of the leases and regulations*." Opp. at 10 (emphasis added).

The problem with this entire line of argument is its reliance on a flat mischaracterization of the Tenth Cir-

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legitimate reservations about whether the lease terms permitted dual accounting." Opp. at 6 n.4.

[5] As Judge Seth put it last January, these apparently are the "*only* Indian or public land leases in the country where this construction is now applied." J.A. 12a (emphasis in original).

cuit's decision. As the Secretary implicitly concedes, a finding of breach by the lessees here would depend upon a prior finding that the lease terms require dual accounting. But far from making such a finding, the Tenth Circuit acknowledged that a contrary interpretation was "reasonable," J.A. 48a, and it relied for its holding solely on the theory that the Secretary has an obligation to interpret and apply *ambiguous* language in the manner that best promotes the Tribe's interests.[6] J.A. 45a. The real "breach" here, in the court's view, was not a violation of the lease terms by petitioners but a breach by the Secretary of his supposed fiduciary duty to maximize Indian royalty payments to the extent possible within the limits left open to him by the leases and regulations themselves.[7]

Once this clarification is made, it becomes clear that the decision below does not involve a "narrow contractual dispute" at all; it is a broad and novel analysis of the duties imposed on the Secretary *qua* fiduciary, which has serious implications with respect to the rights and expectations of all private parties who contract with Indians under governmental supervision. It also becomes clear that the imposition of retroactive liability on petitioners is indefensible.[8] Even assuming that the Tenth

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[6] Even the Tribe itself acknowledges that the leases and regulations "vest discretion in the Secretary" to choose from among various royalty systems. Opp. at 9. *See* Lease ¶ 3(c), J.A. 380a (price received by lessee may be taken as "conclusive evidence" of value).

[7] The suggestion that petitioners violated the terms of the leases by not engaging in dual accounting is also inconsistent with the Secretary's argument that his previous administration of these leases comported with his fiduciary duties. *See* Opp. at 6 n.4. If, in fact, a requirement of dual accounting could be discerned at this late date in the lease terms themselves, the Secretary would have breached his obligations by failing to notice this requirement for almost thirty years. And he would still be breaching his duty by failing to require dual accounting under many other identical leases.

[8] By shifting the focus of his discussion to a supposed breach of the lease terms by petitioners, the Secretary neatly avoids any

Circuit's fiduciary theories were correct, they would not begin to show how petitioners have in any way breached *their* duties under the leases. They, after all, simply followed the royalty system approved by the Secretary at the time they were making these past royalty payments. And that is all that the leases can fairly be read to require of them.

4. In view of the strained nature of the Secretary's arguments, it seems reasonable to take a closer look at the factors that might lead him to counsel against review of a seminal decision with which he flatly disagrees. We have already alluded to one such factor—the identity of the parties who have been ordered to pay damages here to recompense the Tribe for the Secretary's breach of fiduciary duty. The Government's concerns about the Tenth Circuit's analysis are likely to be much more forcefully expressed in a later case where, as is usually true, the Secretary as fiduciary is paying the cost of his own "misconduct." [9]

More fundamentally, if the decision below is left in place, the Secretary will be shielded from any challenges by petitioners to the validity of his own apparent decision to require dual accounting under these leases. If the decision below is reversed, by contrast, the new policy requiring dual accounting will be highly suspect. It will come on the heels of nearly three decades of contrary practice— and thus will require a much more cogent jus-

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discussion of the principle that fiduciaries—not third parties—are generally responsible for the damages caused by their own breaches of fiduciary duty. He does not even attempt to distinguish *Nevada v. United States*, 463 U.S. 110, 144 n.16 (1983), which applied this principle to a breach of duty by the Secretary in his representation of Indians in a water-rights dispute. In any event, as discussed in the petitions, no meaningful distinction could be drawn.

[9] We note that the Tribe's claim for damages against the Government in the present dispute has been stayed pending the outcome of this case. *Jicarilla Apache Tribe v. United States*, No. 112-77 (Cl. Ct.).

tification than the Secretary has heretofore provided. Indeed, petitioners could then argue that the acceptance of a different royalty system by all parties for many years is itself sufficient to resolve any ambiguities in their favor.[10] In addition, the Secretary would be forced to explain why his policy concerning these leases differs sharply from the practice everywhere else. He would have to produce some justification other than the fact that these particular leases are the subject of litigation.

Each of these factors may help to explain the anomalous positions adopted by the Secretary in this Court. Neither, however, provides any valid reason for deferring consideration of the important issues raised here to some later case.

5. The Tribe offers two additional reasons why review should be denied here. Both are specious. First, the Tribe seeks to reintroduce into this case the notion that the contracts between the lessees and their customers were not "arms-length" and thus had the effect of reducing royalties due to the Tribe under the "BTU-adjustment" method. This argument was flatly rejected on the facts by the District Court after a full trial. The

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[10] Unlike the Secretary, the Tribe at least acknowledges our argument that the proper interpretation of the leases and regulations, based on original intent, can be derived from the fact that petitioners made nearly thirty years of supervised royalty payments without dual accounting. *See Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana*, 105 S. Ct. 2587 (1985). The Tribe's response is an attempt to show that the Secretary never looked at the issue prior to 1979. However, this argument is contradicted by the Secretary's explanation of why he *deliberately* rejected dual accounting prior to 1979. Opp. at 6 n.4. The Tenth Circuit also acknowledged that the Secretary had a clear *policy* against dual accounting during this period. J.A. 42a ("At the time this litigation began, the Secretary used the BTU method to calculate royalties due the Tribe.") *See also In re Supron Energy Corp. et al.* (No. 79-374, Interior Board of Land Appeals, March 21, 1980) (affirming the Area Supervisor's decision to impose dual accounting for the years 1974-76 solely on the lessee that had an interest in the processing plant in those years).

court found that the contracts at issue were arms-length and that any relationships among some of the corporations involved did not affect the prices paid. J.A. 114a.

Second, the Tribe refers to the fact that the Secretary is presently considering revised mineral lease regulations. But this fact is equally irrelevant. The proposed revisions neither moot the issues presented here nor support the argument for dual accounting. More fundamentally, as long as the decision below is in place, any new rules or lease terms would be subject to the same erroneous analysis of fiduciary duty that determined the outcome here.

CONCLUSION

The petitions for a writ of certiorari should be granted.

Respectfully submitted,

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